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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 503.

J. SMYLIE HERKNESS,

Appellant,

versus

VALENTINE K. IRION, Commissioner of Conservation of the State of Louisiana, and PERCY SAINT, Attorney General of the State of Louisiana.

BRIEF FOR APPELLEE.

PERCY SAINT,
Attorney General;
W. H. THOMPSON,
Assistant Attorney General.

Of Counsel:
EDWARD RIGHTOR.

MONTGOMERY-ARDREY PRINTING CO., INC., 420-432 CHARTRES, N. O.

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versus

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BRIEF FOR APPELLEE.

THIS COURT IS WITHOUT JURISDICTION.

The jurisdiction of this Court, according to brief of appellant, is invoked under paragraph 3 of Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat., 936, 938.

It is believed that the jurisdiction of this Court is not sustained by the authorities cited. It is believed that this Court is without jurisdiction and that this want of jurisdiction is sustained by *Moore v. Fidelity & Deposit Co., 272 U. S., 317; Smith v. Wilson, 273 U. S., 388.*

STATEMENT OF THE CASE.

Appellant, Herkness, is the owner of 80 acres of land, and of the gas rights on seven hundred sixty contiguous acres in the Monroe Gas Fields of Louisiana. (Par. 4 of Complaint, R. 2).

Under State permit two producing gas wells were drilled. One of the wells was on the eighty acres owned in fee simple, and the other on the seven hundred sixty acres. (Par. 5 of Complaint, R. 2).

Appellant contends that this land and the gas rights were purchased by him with a view of erecting a plant for the manufacture of carbon black and a plant for the manufacture of ink from the carbon black so produced; that he purchased the property in June, 1925, for a consideration of $212,000.00, and that it is without substantial value except for the purpose of producing natural gas and manufacturing it into carbon black. (Par. 6 of Complaint, R. 3).

He further complains that the Legislature of Louisiana has not prohibited the use of natural gas for the making of carbon black, but that by the provisions of Act 91 of 1922 it has expressly authorized its use in the manufacture of carbon black under the conditions imposed by that act and by Act 252 of 1924. (Par. 7 of Complaint, R. 3). That he applied to the Commissioner of Conservation for a permit to erect a factory for the manufacture of carbon black, and that the application was made on the form pre-

scribed by the Commissioner; that he was ready and willing to comply with all statutory requirements relative to the manufacture of natural gas into carbon black.

The Commissioner of Conservation alleged that the extraction of natural gas from the soil and the making of same into carbon black, which the appellant declared he exclusively intended to do, is a waste of the natural resources of the State; that the natural gas in said field was being extensively used for industrial and domestic purposes; that there was being constructed a pipe line whereby the natural gas of the field would be thus supplied for industrial and domestic purposes at a cheaper price; that in 1924 the Legislature passed Act 252 to conserve the natural gas resources of the State and to define the conditions under which natural gas could be burned into carbon black, and to limit the amount that could be produced. Since April 14, 1924, no permit had been issued by the Conservation Commission to anyone to extract natural gas from the soil for manufacture into carbon black, and all permits applied for had been rejected and refused. In spite of the public declaration of the Commissioner of Conservation that he would grant no more permits for the manufacture into carbon black, appellant, Herkness, in June, 1925, long after said policy had been established, came into this State and purchased the said property; that the Commissioner of Conservation was ordered by the Constitution to protect, preserve and replenish the natural resources of the State, and to further permits by him for the manufacture of carbon black would result in a waste and complete exhaustion; that he is given the authority to issue permits in his official capacity; that he embarked on this

policy of not renewing permit already granted, and has permitted only those who are already engaged in the manufacture of carbon black to continue same to a limited extent, because the shutting down of their plants would result in the destruction of large investments which had been made; that he had been reducing the quantity of natural gas by the owners of wells already operating, with the end in view of ultimately stamping out the industry in this State without too heavy a loss to those already engaged in the industry; that the Commission had gradually been reducing the output of carbon black from high pressure gas in the State; that on March 21, 1925, it curtailed the supply of gas and reduced the carbon black to two hundred ninety-nine million feet per day; on September 1, 1925, to two hundred ninety million feet per day, and on March 1, 1926, to two hundred seventy-five million feet per day; that at one time there was used from said field for carbon black purposes from four hundred fifty to five hundred million feet per day, and that if he were forced to grant a permit to the appellant that he must grant permits to all applicants and the policy of the State in preserving its natural gas for industrial and domestic use would be defeated.

The Commissioner applied to the Attorney General for an opinion as to whether he had the legal authority to refuse to issue the permit. The Attorney General advised him that he had full power to decline any further permits (R. 15) and the permit was therefore declined. The Attorney General and the Commissioner of Conservation informed complainant that they would use all legal means at their command to prevent his manufacture of carbon black without a permit. (R. 18).

Complainant applied to the District Court of the United States for an injunction restraining the defendant from interfering with the erection of a carbon black plant or with the operation thereof, and restraining them from attempting to impose penalties for the erection of the plant. (R. 11).

Appellant complained that the Legislature of the State had not confined, or attempted to confine, the production of natural gas and the manufacture thereof into carbon black, to those persons who were then engaged in such manufacture and production, and that the action of the defendant, Irion, acting in conjunction with the Attorney General, in attempting to prohibit him from manufacturing gas into carbon black is **illegal and without authority, and contrary to the laws of the State.** (Par. 17 of Complaint, R. 8).

He complained that if the laws of the State of Louisiana are to be construed as authorizing the Commissioner to prohibit him or as delegating to the Commissioner the right to prohibit such manufacture, except by persons to whom he may choose to issue such permits, then such laws are in violation of the provisions of Sections 1 and 2 of Article II of the Constitution of Louisiana of 1921, dividing the powers of Government and prohibiting the exercise of legislative power by the Executive Department, and of Section 6 of Article I of the Constitution of Louisiana, prohibiting the deprivation of property, except by due process of law, and of the provisions of Section 1 of the Fourteenth Amendment prohibiting any State from depriving any person of property without due process of law, or denying

to any person the equal protection of the law. And he complained that since the combinations referred to, the price of carbon black had been increased from five to eight cents per pound.

Defendants excepted to the complaint, as follows:

(1) That the Court was without jurisdiction *rationae personae* or *rationae materiae*.

(2) That Article 266 of the Judicial Code does not authorize these proceedings.

(3) That this is a suit against the State, contrary to the 11th Amendment to the Federal Constitution.

(4) That the bill is insufficient to constitute a valid cause of action in equity. (R. 18).

With reservation of these exceptions the defendant answered, admitting the refusal to grant a permit. He claimed that it was discretionary for him to issue permits and that to issue a permit to the appellant would be contrary to the policy publicly announced. On this bill and answer and an affidavit of complainant, given in lieu of testimony (R. 24, 25), the case was heard.

At the time of trial in the Lower Court, complainant requested a stipulation that the hearing be considered a final hearing. It was so stipulated (R. 30). The Lower Court entered a final decree. (R. 37). Appellant appealed from a final decree. (R. 38).

The stipulation of the parties (R. 30) is "that the hearing had in this suit on January 1, 1926, shall be considered and treated as a final hearing."

The Court, consisting of Foster, Circuit Judge, and Grubb and Burns, District Judges, dismissed the bill. (R. 37, 38). Subsequently, an appeal was prosecuted to this Court, and pending the determination of this appeal the defendants were enjoined from interfering with the erection and operation of a carbon black plant.

ARGUMENT.

(I)

The Court Below Was Without Jurisdiction and an Appeal Was Improperly Allowed to This Court.

Under Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, no right exists to a direct appeal to this Court on constitutional grounds alone; the right now exists only in cases falling within the provisions enumerated in that section. Among the provisions so enumerated is Section 266 of the Judicial Code. *Moore v. Fidelity & Deposit Co., 272 U. S., p. 317.*

If the Court of three Judges was not vested with jurisdiction, then an appeal would not lie directly to this Court. *Smith v. Wilson, 273 U. S., 388.*

In order for the Court below to have jurisdiction under Article 266 of the Judicial Code, it was necessary for complainants to attack Act 252 of 1924 as being in conflict with the Constitution of the United States, or to attack as unconstitutional an order issued by an administrative board or commission acting under and pursuant to a statute of such State.

The complainant does not attack Act 252 of 1924 as being violative of either the Federal or the State Constitution, neither does he attack an order made by the Conservation Commissioner as unconstitutional. There is no allegation in the complaint that the Conservation Commissioner, acting under and pursuant to the statutes of the State of Louisiana, has issued any order which is violative of either the Federal or the State Constitution. The allegations of the complaint are found in paragraphs 17 and 18, which are as follows:

> "Section 17. Complainant alleges that he has a lawful property right in and to the land owned by him in fee simple, hereinabove described, and in and to the two gas wells hereinabove described, and has also the right of the free use and enjoyment thereof, subject only to such restrictions as might be reasonably and lawfully imposed upon him in common with all other persons, by the Legislature of Louisiana, with regard to the extraction of natural gas and with regard to the use thereof; that the Legislature of the State of Louisiana has not confined, or attempted to confine, the production of natural gas and the manufacture thereof into carbon black, to persons who are now engaged in such production and such manufacture; that the action of the defendant, Valentine K. Irion, acting in conjunction with and under the advice of the defendant, Percy Saint, in attempting to prohibit complainant, and all persons other than those now engaged in the production of natural gas and in the manufacture thereof into carbon black from producing such gas or manufacturing same into carbon black is illegal and without authority, and contrary to the laws of the State of Louisiana.
>
> "Section 18. That if the laws of the State of Louisiana are to be construed as authorizing the

defendant, Valentine K. Irion, to prohibit the production of natural gas and its manufacture into carbon black, save in the case of such persons as are now engaged therein, or as delegating to said Irion the right to prohibit such production and manufacture, except by persons to whom he may choose to issue permits, then such laws are in violation of the provisions of Sections 1 and 2 of Article II of the Constitution of Louisiana of 1921, dividing the powers of Government and prohibiting the exercise of legislative power by the Executive Department, and of Section 1 of Article VI of said Constitution providing for the protection by the Legislature of the natural resources of Louisiana, and of the provisions of Section 2 of Article I of said Constitution, prohibiting the deprivation of property, except by due process of law, and of the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States prohibiting any State from depriving any person of property without due process of law, or denying to any person the equal protection of the law."

It will thus be seen that he only attacks the acts of said Irion and Saint as being illegal and without authority, and contrary to the statutes of the State of Louisiana. (Par. 17 of the Complaint, R. 7).

There is no allegation in this paragraph that they, or either of them, acted either under an unconstitutional statute or under an order issued and made pursuant to a statute of the State of Louisiana. The contention is, that they were acting contrary to and beyond any statute. Paragraph 18 clearly shows that he is attacking the construction placed upon Act 252 of 1924 by the authorities of the State of Louisiana.

We believe that counsel concedes that no attack is made upon the constitutionality of Act 252 of 1924, because they contend that the order is unconstitutional and that the order being unconstitutional gives to this Court jurisdiction. Unfortunately for counsel, the complaint does not allege that an unconstitutional order was made and issued by the Conservation Commissioner pursuant to and in accordance with the statutes of the State. In fact, no order has been issued within or without a statute of the State of Louisiana, unless it be said that the letter written to complainant or the declared policy of the Commission could be construed and held to be an order within the meaning of Section 266 of the Judicial Code.

If we are correct in our contention that under paragraph 3 of Section 238, as amended by the act of February 13, 1925, that the Court of three Judges would only have jurisdiction where the unconstitutionality of a statute or an order issued by an administrative board pursuant to a statute was attacked as unconstitutional, then it follows that this special tribunal was without jurisdiction, and it being without jurisdiction no appeal would lie directly to this Court.

In the case of *Okla. Gas Co. v. Russell*, cited by complainant, an order was issued refusing the application for an advance in the gas rates, and, of course, presumably the Commission issued a written order denying the increase; and, in so doing, it was acting under the authority of and pursuant to a statute of the State of Oklahoma.

As stated before, no such allegations are made in the bill filed in this case, and, therefore, this case is not authority for the position taken by the complainant.

(II)

This appeal does not come under Section 266 of the Judicial Code and should be dismissed for lack of jurisdiction.

Complainant contends that he has correctly taken from the decree of the Court of three Judges an appeal direct to this Court. Defendant contends that appeal herein should have been made only to the Court of Appeal. Both of us, however, rely for the correctness of our contention upon the same authorities.

Our understanding is that under *Smith v. Wilson, 273 U. S., 388, 47 S. C., 385,* and *Moore v. Fidelity & Deposit Company, 272 U. S., 317,* there are three conditions that must exist in this case in order that an appeal might be taken direct to this Court:

(1) A proper constitutional question must be at issue.

(2) There must have been an application for a preliminary injunction "made and pressed to a hearing" before three Judges; and,

(3) There must have been a final hearing before three Judges.

In the cases cited above, this Court found that both the purpose of the statute and its amendments was to require three Judges on both hearings and "to relieve this Court by restricting the right to review by it."

As we understand the statute, a hearing is required before three Judges on preliminary hearing and another hearing before three Judges on final hearing in a case adversely decided, before this Court can hear the case on direct appeal from a decree on final hearing. Then, and only then, will this Court consider a final decree adversely to appellant.

Has there been a hearing before two Courts of three Judges herein?

At the time of trial in the Lower Court, complainant requested a stipulation that the hearing be considered a final hearing. It was so stipulated (R. 30). The Lower Court entered a final decree (R. 37). Appellant appealed from a final decree (R. 38). There was, therefore, no hearing before six Judges as the statute requires.

In *Smith v. Wilson*, as here, the preliminary injunction was applied for but not pressed. A final hearing was alone had. The appeal, therefore, should herein be made to the Court of Appeal and this appeal should be dismissed.

It is not contended that were this an appeal from a decree refusing a preliminary injunction that this Court would not have jurisdiction, but it is contended that this is an appeal from a decree refusing a permanent injunction.

The stipulation of the parties (R. 30) is "that the hearing had in this suit on January 21, 1926, shall be considered and treated as a final hearing." The Lower Court entered a final decree. (R. 37).

In appellant's petition for an appeal (R. 38) appellant says: "On March 6, 1926, a final decree was entered and signed."

In appellant's assignment of errors (R. 44), No. 15, he says, "the Court erred in not rendering a final decree in petitioner's favor as prayed and in not issuing a permanent injunction as prayed for by petitioner."

There can be no good reason why an appeal should be allowed to this Court direct on a refusal to grant a temporary injunction and should not be allowed to this Court direct on the refusal to grant a permanent injunction, in the second case only where an application for a preliminary injunction was made and pressed to a hearing, other than this: that the law writer thought that a permanent injunction was a matter of so much more serious moment than a preliminary injunction, that a hearing by six Judges must be had in the case of a permanent injunction whilst only three were required in the case of a preliminary injunction.

Considering the herein appeal as a hearing that resulted in a permanent decree, then the record in this case as far as the instant question is concerned is in exactly the same condition as the record in *Smith v. Wilson*, cited above.

The Court below was clearly correct in holding that it was "concerned only with violations of the Federal Constitution." (R. 34).

It is believed that this contention is supported by *Cook v. Burnquist, et al., 242 Fed., 321;* and *Virginia v. U. S., 272 U. S., 671,* in which this Court said:

> "Section 266 provides for the hearing before three judges of applications for an interlocutory injunction to restrain the execution of a State statute, or of an order of an administrative board of the State pursuant to a State statute, where the statute or order is assailed on the ground that it violates the Federal Constitution."

(III)

The Court below held that the unconstitutionality of either the statute or an administrative order, under the State Constitution, does not concern it, and that it was concerned only with violations of the Federal Constitution.

This appellant, in brief, contends was error.

The view of the Lower Court is correct and is supported by the following authorities:

Cook v. Burnquist, 242 Fed., 321.

Okla. Gas. Co. v. Russell, 261 U. S., 291; 67 L. Ed., 659.

ExParte Buder, 271 U. S., 461.

Ex Parte Williams, reported in *Advance Opinions of June 15, 1928, No. 16, p. 523.*

If the Court should hold that it was its duty to pass upon the questions presented from the standpoint of the State law, then we submit that the actions of the defendants are fully authorized and justified by law.

The position of the appellant is that the statutes of the State of Louisiana do not prohibit the manufacture of gas into carbon black, and do not authorize the Commissioner of Conservation to refuse a permit for the erection of new plants.

Article VI, Section 1 of the Constitution, provides as follows:

> "Section 1. The natural resources of the State shall be protected, conserved and replenished; and for that purpose shall be placed under a Department of Conservation, which is hereby created and established. The Department of Conservation shall be directed and controlled by a Commissioner of Conservation to be appointed as elsewhere provided in this Constitution, who shall have and exercise such authority and power as may be prescribed by law. The Legislature shall enact all laws necessary to protect, conserve and replenish the natural resources of the State, and to prohibit and prevent the waste or any wasteful use thereof."

Pursuant to this constitutional authority the Legislature passed Acts 91 of 1922 and 252 of 1924.

The title of Act 252 of 1924, in part, provides as follows:

> "To define the conditions under which natural gas can be burned into carbon black."

Section 5 provides:

> "The Commissioner of Conservation **may** grant permits for the building of plants to burn natural gas into carbon black under the conditions and provisions of Act 91 of 1922, except that the percentage of the open flow capacity of gas wells

that may be utilized in burning carbon black shall be controlled by this Act when the production of such wells is controlled by this Act and by Act No. 91 of 1922 when the percentage that such wells may produce is controlled by said Act 91 of 1922. Such permits shall only be granted to *bona fide* applicants and which permits shall automatically expire one year after date of issue."

Sub-section 3 of Section 5 provides:

"No permit shall be granted, and the Commissioner of Conservation is without authority to grant a permit for the construction of a new carbon black plant except upon written forms."

A reading of the title, and the sections herein referred to, discloses that the Legislature intended to, and did prohibit the manufacture of natural gas into carbon black, except where the Commissioner of Conservation may issue a permit. If he issues a permit he can only do so under the terms and conditions imposed by Act 97 of 1922, and sub-section 3 of Section 5 of Act 252 of 1924.

This Act, therefore, confers full power upon the Commissioner to refuse to grant a permit for the erection of a new carbon black plant. There is no provision in Act 91 of 1922, or 252 of 1924, which says the Commissioner shall issue a permit to erect a plant. The language is that:

"He may grant permits for the building of plants to burn natural gas into carbon black under the conditions and provisions of Act No. 91 of 1922, except that the percentage of the open flow capacity of gas wells that may be utilized in burning carbon black shall be controlled by this Act and by Act No. 91 of 1922 when the percentage that such wells may

produce is controlled by said Act 91 of 1922. Such permits shall only be granted to *bona fide* applicants and which permits shall automatically expire one year after date of issue."

In this case, Herkness applied for a permit to erect a new carbon black plant. He did not apply for the renewal of an old permit. His application was denied by letter of the Commissioner. The treatment received by him was not different from that accorded other applicants. Their applications were also denied. In fact, no applications for permits to erect new carbon black plants anywhere in the State have been granted by the Commissioner since the passage of Act 252 of 1924.

We, therefore, submit that the authority of the Commissioner to refuse to issue a permit for the erection of a new carbon black plant was not conferred by an order issued and promulgated by the Commission, but was expressly conferred by the Legislature of Louisiana. Being conferred by statute his actions could not, as charged in the complaint, be illegal, beyond and contrary to the statutes of the State.

The authority under which the Commissioner acted, and is acting, was and is derived from a statute and not from an order. This being true we find, from an examination of the complaint, that no attack is made upon Act 252 of 1924, or Section 5 thereof, as being violative of either the Federal or State Constitution. In fact, we think that counsel concede this. (See Par. 8 of brief).

There being no order to attack, and no attack being made upon Act 252 of 1924, the argument of counsel is in-

applicable. Counsel argues that if Act 91 of 1922 and Act 252 of 1924 be construed as delegating to the Commissioner of Conservation the right to refuse permits, then said acts violate the provisions of Article II of the Constitution of Louisiana, prohibiting the delegation of legislative power to the Executive Department.

This question is not raised by the complaint, but if the Court should hold that the unconstitutionality of the statute is at issue, then we submit that the act does not offend against the said article.

It is true that by the authority of Section 1 of Article V of the Constitution the Commissioner of Conservation is made a part of the Executive Department.

It is true that the powers of the Government of the State of Louisiana are divided into three distinct departments—legislative, executive and judicial, and it is true that no person or collection of persons holding office in one of them shall exercise power properly belonging to either of the others, except where expressly permitted by the Constitution. The power conferred by the Legislature upon the Commissioner insofar as the issues in this case are concerned are "expressly directed and permitted by the Constitution of the State."

This authority is found in *Section 1 of Article VI*, which provides:

> "Section 1. The natural resources of the State shall be protected, conserved and replenished;

and for that purpose shall be placed under a Department of Conservation, which is hereby created and established. The Department of Conservation shall be directed and controlled by a Commissioner of Conservation to be appointed as elsewhere provided in this Constitution, who shall have and exercise such authority and power as may be prescribed by law. The Legislature shall enact all laws necessary to protect, conserve and replenish the natural resources of the State, and to prohibit and prevent the waste or any wasteful use thereof."

Here we see that the Constitution provides:

"That the Department of Conservation shall be directed and controlled by a Commissioner of Conservation, who shall have and exercise such power and authority as may be prescribed by law."

The action of the Commissioner in this case was prescribed by law, to-wit: Act 252 of 1924. It was not prescribed by an order of the Commission. The power was vested by authority of the Constitution, not contrary to the Constitution.

Art. 296 of the Constitution of 1898 provides:

"The General Assembly shall create for the State, and for each parish, and municipality therein boards of health, and shall define their duties and prescribe the powers thereof.

Pursuant to this constitutional authority the Legislature passed Act 98 of 1906, which authorized the State Board of Health to promulgate a sanitary code, and to make violations thereof a penal offense.

In accordance with this legislative grant the State Board of Health adopted a Sanitary Code. The 37th Section of which provided

> "The use of saccharin in any food product is prohibited."

In the case of *State v. Snyder, 131 An., 146*, the constitutionality of this section was put at issue. The attack made in that case was that the Legislature could not validly delegate to the State Board of Health the power to provide and declare what conduct shall constitute a crime; that the power by which conduct otherwise innocent is made criminal is legislative, and that the legislative power cannot be constitutionally delegated to some subordinate functionary.

The Supreme Court of Louisiana said:

> "The contention would be well founded if it were not Article 296 of the Constitution, reading 'The General Assembly shall create for the State and for each parish and municipality therein boards of health and shall define their duties and prescribe the powers thereof.'"

The Court further said:

> "Here the Legislature is authorized to prescribe the powers of the Board of Health. This can only mean to delegate to the Board of Health such power as may be deemed necessary for efficiently carrying out the purposes for which a board of health is created and the power most obviously necessary in such a case is to make health regulations that shall have the force of laws."
>
> *State v. Snyder, 131 An., 146.*

The case is still the law and it has never been overruled.

In the present case the Constitution says "the Commission shall have and exercise such authority and power as may be prescribed by law." This power is conferred by the Legislature.

In support of their contention counsel cites the case of *State v. Billot, 154 La., 402.* This case is not authority for their position. In addition, it was overruled by the case of the *State v. Thrift Oil & Gas Co., 162 La., 166.* It is true that a rehearing was granted in this case and that it was decided on other grounds on rehearing. However, it is clear that the Court will no longer follow it. The Court held that it was directly in conflict with the cases of *United States v. Grimaud, 220 U. S., 506, 55 L. Ed., 563,* and *Fred Light v. United States, 220 U. S., p. 523, 55 L. Ed., 570.*

In these cases this Court said:

> "The Secretary of Agriculture could not make rules and regulations for any and every purpose. As to those here involved they all relate to matters clearly indicated and authorized by Congress. A violation of reasonable rules, regulating the use and occupancy of the property is made a crime not by the Secretary but by Congress. The statute, not the Secretary, fixes the penalty. The Secretary did not exercise the legislative power by declaring the penalty or by fixing the punishment. The punishment is imposed by the act itself."

In the present case the manufacturing of natural gas into carbon black without a permit, or the erection of

a new carbon plant without a permit, is made a crime not by order of the Conservation Commission but solely by the statute itself. The penalty imposed for so doing is provided not by order of the Commissioner, but by the statute itself. No power is delegated to the Commissioner to impose penalties nor to prosecute. This power is conferred only on the authorized officers.

We, therefore, submit that the contention of appellant upon this point is without merit.

(IV)

As we understand the contention of relator, it is that whether the unjust discrimination complained of is caused by an unconstitutional executive order or an unconstitutional legislative act, relator urges upon the Court that he is not by the State of Louisiana given the equal protection of the law, because the result of the executive order or legislative act is to permit those already engaged in the manufacture of carbon black before relator's application for a permit, to continue to make carbon black in that State and to deny to all others and, amongst them, relator himself, the right to make carbon black.

That in so doing a discrimination has been made between relator and those already in the business is not a matter of dispute.

But that such discrimination is an unjust and arbitrary discrimination without adequate relation to the public welfare of the State of Louisiana and a discrimination

that the State cannot in the exercise of its police power make the burden rest upon relator to show.

In considering such question it should be kept in mind that the facts set forth in the State's sworn return must be taken as correct and such facts are, it is evident, mostly facts that are within the common knowledge of all men.

They are, that the conservation of the supply of oil and natural gas is a matter of the utmost importance to the welfare of the individual states and of the entire nation. That the owner of land from which natural gas is taken has not a full ownership in such gas until it is reduced to his possession.

That until such possession is had, the State has the right of control of natural gas.

That the greatest economic waster of the nation's supply of natural gas is the carbon black manufacturer.

That a State can absolutely prohibit the manufacture of carbon black. *Walls v. Midland Carbon Company, 254 U. S., 300.*

That since 1924 no permits have been issued by the State of Louisiana for the building of carbon black plants and the product of the extant plants is being gradually reduced by the efforts of the legislative and executive departments of the State.

Answer of State, paragraph 36, R. p. 23.

Appellant's brief, pages 3 and 5.

That in 1924 the Commissioner of Conservation publicly declared that he would issue no further permits and that then the policy of the State to gradually suppress the business with as little injury to those who had already invested in it, that the welfare of the State would permit, was fixed. That in 1925 in the face of this publicly declared policy, the present complainant, a citizen of Pennsylvania, came into the State of Louisiana, and with his eyes open to these facts, invested some $200,000.00 in property in this State, which he, in Article 6 of his bill, declares "is without substantial value except for the purpose of producing natural gas and manufacturing it into carbon black."

It is to be noted that he then attempts to veneer the inequitable facts of his case by stating that the object of the Commissioner was not the protection of the material well-being of the people of the State, as is clearly shown by a recital of the above undisputed facts, but was to establish a monopoly in those who have permits and who are at present manufacturing carbon black. (Bill of Complaint, Article 14, T. 5).

And it is well to also note that if such a distinction as has been made by the Commissioner is an unconstitutional classification under the 14th Amendment or establishes a monopoly under the Constitution and statutes of Louisiana, all classifications that are made by any State in any issuance of permits are contrary to the 14th Amendment and all systems of issuance of permits by States are the establishments of monopolies by such systems, and no distinction under their police powers can be made by the States under any circumstances whatsoever.

It is almost needless to cite authorities to maintain the position that that section of the 14th Amendment which complainant has invoked has always very properly been construed to protect and to protect alone, the property that a complainant owned previous to the enactment of the legislation that complainant avers makes unjust discrimination against him and not property that he acquired after the passage of such legislation.

In addition we beg to call the Court's attention to the fact that this is not a case where relator has been refused a permit and permits are being granted to others similarly situated, but this is a case where relator's permit has been refused and permits have been refused to all others who have made application for permits. The unjust discrimination complained of by relator, then, as a matter of substantive law, is a discrimination whereby the State of Louisiana declares that those who owned carbon black plants previous to the passage of the State's law and the establishment of its executive policy, may continue in the business subject to a gradual reduction of production and an ultimate suppression and that no further permits to do such business will be granted, is such a discrimination that cannot be made in the interest of the welfare of the State, imposed in the legitimate exercise of its police powers and that it works an oppressive injustice to those not already engaged in the business but who desire to embark in it.

As this Court said in *Waugh v. University of Mississippi, 237 U. S., 589*, a case wherein the constitutionality of a statute of Mississippi forbidding Greek letter frater-

nities in the State University was attacked as making an unjust discrimination in that the statute did not apply to students who had already entered, "This order is assailed as making a clear discrimination between the 'ins' and 'outs.'" The Court said the discrimination was based on an obvious and rational distinction. The obvious and rational distinction is equally clear here.

In *Watson v. Maryland, 218 U. S., 173,* where the constitutionality of the medical registration act was attacked because it exempted certain physicians from registration, the Court said:

> "Classification will not render a state police statute unconstitutional as denying equal protection of the law so long as there is a reasonable basis for such classification; nor will exceptions of specified classes render the law unconstitutional unless there is no fair reason for the law that would not equally require its extension to the excepted class. Williams v. Arkansas, 217 U. S., 79."

Is there not here clearly a fair reason that requires the excepted classes to be excluded? Chief Justice Taft recently said that the 14th Amendment in as far as its provisions now here invoked are concerned, did no more than require the law of fair play.

Would it have been fair play for the State of Louisiana to have suddenly suppressed and stamped out the business and plants of those already engaged in the making of carbon black? Is it not more in accord with a right idea

of fair play, that the State should say we will grant no more permits to manufacture carbon black but those who are already engaged in the business shall gradually stop making carbon black. They shall have a chance to get their money back that they have invested in the business. Another policy would have been confiscation—although lawful confiscation.

(V)

Appellant seeks to enjoin the Conservation Commissioner and the Attorney General (1) from interfering with the erection of a carbon black plant and (2) from instituting any suit, civil or criminal, to penalize him for the erection of same without a permit.

Act 252 of 1924 is the only Act referred to by complainant which imposes a penalty. There is no order imposing a penalty. If a fine or sentence is ever imposed upon appellant it must be imposed under Act 252 of 1924. This Act is solely and purely a criminal statute.

It must be remembered that appellant has not appealed to any Court to compel the issuance of a permit. It must be remembered that neither the Attorney General, nor any District Attorney has filed, or instituted, either civil of criminal action. Indeed, no civil action is allowed under the statute except that after a certain number of convictions a suit could be filed to forfeit his right to do business which could only be done where the violations are

willful, and then only where the second violation succeeds a prior conviction, and the third violation succeeds a second conviction. The action is, therefore, clearly to enjoin and restrain the enforcement of a criminal statute of the State.

The general rule is that Courts of equity will not interfere to prevent the enforcement of a criminal statute, even though unconstitutional. *Packard v. Banton, 264 U. S., 140; In re. Sawyer; 124 U. S., 200; 189 U. S., 207.*

In brief, appellant contends that *Ex Parte Young, 209 U. S., 123*, exactly fits this case. We think that this contention is answered by this Court in the later case of *Fenner v. Boykin, 70 Law Ed., 927*, where the Court said:

> "Ex parte Young, 209 U. S., 123, and following cases have established the doctrine that when absolutely necessary for protection of constitutional rights courts of the United States have power to enjoin state officers from instituting criminal actions. But this may not be done except under extraordinary circumstances where the danger of irreparable loss is both great and immediate. Ordinarily, there should be no interference with such officers; primarily, they are charged with the duty of prosecuting offenders against the laws of the state and must decide when and how this is to be done. The accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection. The Judicial Code provides ample opportunity for ultimate review here in respect of Federal questions. An intolerable condition would arise if, whenever about to be charged

with violating a state law, one were permitted freely to contest its validity by an original proceeding in some Federal court." *266 U. S., 497.*

"The general rule is that equity will not interfere to prevent the enforcement of a criminal statute even though unconstitutional." *Packard v. Banton, 264 U. S., 140; In re Sawyer, 124 U. S., 200; 189 U. S., 207.*

In re Amalgamated Oil & Gas Corporation v. City and County of San Francisco, 263 Fed., 217, the Court said:

"It will thus be seen that what plaintiff really is complaining of is, not an attempt or threat to enforce, as against it, an unconstitutional or otherwise invalid regulation, but a mistaken or unwarranted effort to subject it to a regulation which, it claims, has no application to the subject matter involved, and the substance of its contention is that the threats of the defendant to subject it, and those deriving their right from it, to prosecution under a law which does not apply to it, constitutes an invasion of its property rights which equity may restrain. In this, plaintiff is mistaken. Its position amounts to no more than that equity may competently intervene to restrain threatened criminal proceedings for the alleged violation of a perfectly valid and constitutional law, merely because such proceedings are based upon what is claimed to be a misapplication of its terms to an act which does not in fact fall within its denunciation, and will thereby work injury to plaintiff's business. Equity possesses no such jurisdiction. The exceptional instances in which a court of equity is justified in interposing its restraining arm to prevent criminal prosecutions are fully and elaborately considered In Re Sawyer, 124 U. S., 200, L. Ed., 402; Davis and

Farnham v. Los Angles, etc., 189 U. S., 207, 47 L. Ed., 778, and Dobbins v. Los Angeles, 195 U. S., 223, 49 L. Ed, 169, and need not be restated. It is sufficient to say that within the principles there announced, it is essential, as a predicate for the relief here sought, that it appear, not only that the ordinance involved is unconstitutional, but that its enforcement will result in a direct invasion of property rights. Neither of those elements are presented in the present bill, since it clearly appears that the injury or loss to the plaintiff's business or rights of property would be simply such as would incidentally flow from the arrest and prosecution threatened. Where the ordinance or law is, as here, clearly constitutional, but a party conceives himself to be unjustly harassed by prosecution or threats of prosecution, his remedy is at law, by a defense in the criminal court where all proper defenses will be open to him; and it adds nothing to the bill making for equitable relief that there are threats of successive or repeated prosecution. Sullivan v. San Francisco Gas & Electric Co., 148 Cal., 381, 83 Pac., 156.

"Nor do the averments that the device constitutes 'a properly constructed kerosine stove,' and as to the flash test of the oil used therein, evidently intended to bring the plaintiff's burner within the exception of the ordinance, add anything to the bill. They tend, if anything, to emphasize the fact that plaintiff has mistaken its remedy. If true, their effect is merely to show that plaintiff is entitled to a permit or license to make and sell its burner under the very terms of the ordinance. If this be so, its remedy is to apply for a permit, and, if unjustly refused, to compel its issuance by a proper proceeding at law, and there is no averment that any such steps have ever been taken.

"Let the restraining order be vacated, a temporary injunction denied, and the motion to dismiss the bill granted."

In the *Pacific States Company v. City and County of San Francisco*, decided on July 26, 1909, reported in the *171 Fed., 727*, the Court said:

> "As to the second objection urged, I do not regard the allegations of unfair and arbitrary action of the city authorities in administering the ordinance, upon which this objection is based, as adding anything of substance to the bill in making a case for equitable relief. The ordinance being a valid regulation, however flagrantly partial its administration may be, the remedy is not in equity to restrain the city authorities from enforcing it, but at law to compel the issuance of a permit if the facts warrant it."

In the *238 Fed., 619*, in case of *Central Consumers' Company of New Jersey v. Austin*, the Court said:

> "These cases show that, in Federal Courts of Equity, the exception to want of jurisdiction to enjoin criminal proceedings in State Courts has the additional limitation that the criminal proceedings must have been instituted to enforce a State statute or municipal ordinance alleged to be in conflict with the Federal Constitution and invalid. The reason for the additional limitation is manifest. If the State officers sought to be enjoined are proceeding under a valid statute of the State, they represent the State, and a suit to enjoin them is a suit against the State within the meaning of the Eleventh Amendment to the Constitution. On the other hand, if the proceedings are to enforce an unconstitutional statute or ordinance, the persons seeking to enforce it on behalf of the State, are not considered as representing the State, but act as individual wrongdoers, and a suit to enjoin them is therefore held not to be a suit against the State."

The Court further said

"In this case, for the purposes of this motion, it is conceded that the State law was valid. The complaint was that the State solicitor was wrongfully construing it to apply to a nonalcoholic beverage. The solicitor was the law officer of the State, and a suit to enjoin him from so doing is a suit against the State. This is nonetheless true because he is charged with having misconstrued the valid statute. The interpretation of the criminal statutes of the State are matters within the exclusive criminal jurisdiction, orignal and appellate; certainly so far as it concerns the jurisdiction of Federal Equity Courts. The Federal Courts follow the interpreta - tion of the State Courts of last resort in such matters.

"If Federal Courts of Equity could interfere with State Courts of competent criminal jurisdiction, or prevent the law officers of the State from enforcing its criminal law, because of anticipated errors of law in the administration of such laws, it is clear that they could equally interfere therewith or prevent such officers from performing their duties to the State, because of anticipated mistakes in decisions of fact. The contention in this case is that the statute does not cover non-alcoholic beverages, and that ambrosia is indisputably a non-alcoholic beverage, but that the State authorities will construe the law to include it. If the statute is conceded to be valid, a Federal Court of Equity has no more right to interfere with the enforcement of the State's criminal laws by its law officers through its Courts, because of anticipated errors in the construction of the statute by the Judge, than it would have to interfere because of anticipated errors in the decisions of fact by a jury.

"Such a ground of Federal equitable interference with the enforcement of the criminal laws

of a State would not be contended for. An interference because of either ground would be an invasion of the jurisdiction of a Court of competent and concurrent, if not exclusive, jurisdiction. Nor can it be assumed that the State Courts will commit error in either respect. The presumption is to the contrary. If the construction given the statute by the law officer of the State is erroneous, it will be presumed that the State Courts will not follow it. Indeed, the correctness of the construction depends entirely upon the decision of the State Court of last resort.

"It is to be presumed that the plaintiff can make good any meritorious defense, either of law or fact, by presenting it in the State Court. Mere apprehension that it may be otherwise confers no jurisdiction on the Federal Courts. If it did, the Federal Equity Courts would draw to themselves full jurisdiction of the enforcement of the criminal laws of the State in all cases, and exercise supervisory jurisdiction over the State Courts in criminal matters. No such principle obtains. It is only when State law officers cease to be such, because acting under unconstitutional State enactments, that Federal Courts have power to restrain their acts, done under color of office, but not by authority of it."

Hoffman v. McElligott, 259 Fed., 525.

If the statute is valid, as is contended by plaintiff, and if the law does not authorize the Commissioner to refuse a permit, then the plaintiff has a remedy by mandamus.

If the construction placed upon the statute by the Attorney General is wrong, and should he, or any District Attorney, proceed to institute a prosecution, then plaintiff can make good any meritorious defense by presenting it

in the State Court. He should first set up his defense in the State Courts, even though this involves a challenge of the validity of the Act. If he is convicted he has an appeal to the State Court and to this Court by review.

We think it clear, therefore, that appellant is not entitled to injunctive relief.

(VI)

If this statute is valid, as conceded by plaintiff, and the Commissioner was without right or authority to refuse the issuance of a permit, then he has a plain, adequate and complete remedy by mandamus.

In the *Pacific States Company v. City and County of San Francisco, 171 Fed., 727*, the Court said:

> "As to the second objection urged, I do not regard the allegations of unfair and arbitrary action of the city authorities in administering the ordinance, upon which the objection is based, as adding anything of substance to the bill in making a case for equitable relief. The ordinance being a valid regulation, however flagrantly partial its administration may be, the remedy is not in equity to restrain the city authorities from enforcing it, but at law to compel the issuance of a permit if the facts warrant it."

This case holds:

> "That where city authorities arbitrarily refuse to grant complainant a blasting permit under a valid city ordinance prohibiting blasting in a city without such permit, complainant's remedy was at law to compel the issuing of a permit, if the facts

warrant it, and not in equity to restrain the city authorities from enforcing the ordinance."

At any rate, it is clear that appellant is not entitled to injunctive relief.

CONCLUSION.

The decree of the District Court should be affirmed.

Respectfully submitted,

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Of Counsel:
EDWARD RIGHTOR.